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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

EDWARD ZHAO,  
Plaintiff and Appellant,

v.

MAZDA MOTOR OF AMERICA, INC.,  
Defendant and Respondent.

A133031

(Contra Costa County  
Super. Ct. No. C0803160)

**I. INTRODUCTION**

This is an appeal from an order granting a new trial on the ground of juror misconduct. Appellant Edward Zhao contends that the order must be reversed because the trial court exceeded its jurisdiction by departing from the strict statutory procedures governing new trial motions and considering evidence of juror misconduct that was submitted too late. Zhao also contends that even if all of the evidence was properly considered, it is insufficient to support the new trial order. We reject these contentions and affirm the order.

## II. STATEMENT OF FACTS<sup>1</sup>

### A. *Background*

On December 16, 2008, Zhao filed a complaint against Mazda Motor of America, Inc. for violating the Song-Beverly Consumer Warranty Act (Civ. Code, §§ 1790 et seq.) by selling him a defective vehicle and by failing to repair the vehicle to conform with Mazda's written warranty after a reasonable number of opportunities to do so. A jury trial commenced on January 4, 2011, before the Honorable Cheryl Mills.<sup>2</sup> During the trial, the court repeatedly admonished the jury not to conduct any outside research or investigation and to base its decision solely on the trial evidence.

The jury began deliberating on January 10. At some point it requested guidance from the trial judge because it believed it was a hung jury. The jurors asked if they could review the entire Song-Beverly Consumer Warranty Act. The court denied that request. The jurors also asked whether the law defined what constitutes a reasonable number of repair attempts. The court responded that that determination was up to the jury. On January 11, the jury returned a 9-3 verdict in favor of Zhao and fixed his damages at \$20,326.62. The trial court dismissed the jury and ordered counsel to return after a lunch break to address the remaining issues in the case.

### B. *The New Trial Motion*

After the lunch break, the trial court asked the parties whether there were issues to address post-trial. Zhao's counsel, Brian Bickel, said that there were not. Mazda's counsel, Bruce Terlep, raised several issues including a "new development" which he recounted to the trial court.

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<sup>1</sup> The rules governing this appeal require that appellant provide us with a "summary of the significant facts limited to matters in the record." (Cal. Rules of Court, rule 8.204(a)(2)(C).) Zhao violates the spirit if not the letter of this rule by alleging a reversible procedural error but presenting an extremely argumentative summary of the procedural history of this case.

<sup>2</sup> Subsequent date references in this Statement of Facts are to the 2011 calendar year unless otherwise indicated.

Terlep explained that, after the jury was dismissed, he walked outside and saw Zhao's attorneys, Bickel and co-counsel Brian Cline, talking with a young male juror. Terlep stopped and exchanged a few pleasantries and then moved on. As he was leaving, Terlep heard the juror say, "You guys are from San Diego," and then tell the attorneys that he had looked at their website. Terlep stopped walking, turned back around and asked the juror whether he had looked at the Bickel Law firm's website and, "[a]fter a stunned bit of silence," the juror confirmed that he had. Terlep said that he stopped talking with the juror at that point because he thought a further inquiry would be inappropriate, but that he subsequently took a look at the Bickel website and was concerned by its content. Terlep also advised the court that his client representative, Roger Tarver, had also heard the juror's comments. Terlep concluded that "I think we have a jury misconduct issue, your Honor, and ask for a new trial on that ground."

When asked to respond, attorney Bickel admitted that he did "think" the juror had said he looked at the website, but Bickel's recollection was that the juror said he did not look at it during the trial. When the trial court observed that there was only five minutes between the conclusion of the trial and the conversation, Bickel suggested that the juror could have used his cell phone to look at the website during that time. Terlep then stated that, as an officer of the court, he could say that he asked the juror twice whether he had looked at the website during the trial and the first time there was stunned silence and the second time the juror answered that he had done so.

The trial court asked each of Zhao's attorneys whether the juror had said that he looked at the website during the trial. Bickel confirmed that the juror said he looked at the website, that Terlep asked whether he looked at it during the trial, and that the juror looked stunned. But Bickel said that he thought the juror said no. Bickel also "thought" that Terlep asked the question again but said he did not hear the second answer. Cline told the court that the juror had said he "checked out" the Bickel firm's website. According to Cline, Terlep asked whether the juror looked at it during trial and the juror was stunned by the question. Cline said he was standing further away from the group

than the participants but that he did hear the juror say “no.” Cline said he did not hear Terlep ask the question a second time.

The trial court asked Terlep whether he asked the question twice and Terlep was sure that he had; the first time, the juror did not answer and the second time the juror confirmed that he looked at the website during the trial. The trial court stated that counsel were all officers of the court and that it would accept Terlep’s account of what happened unless Bickel challenged it. Bickel accepted that the juror said that he checked out the website but challenged whether he looked at it during the trial. Bickel also said that, after Terlep walked away, the juror was upset and concerned he did something wrong. Bickel, who admitted that he, too, was “a little bit shaken up by the whole thing,” told the court that he could not remember what he or the juror said after Terlep walked away.

The court then turned its attention to Roger Tarver, Mazda’s representative at trial. Noting that Tarver was not an officer of the court, the court directed that Tarver be sworn in before sharing his recollection of the incident. Tarver then recalled that he heard the juror say that he had checked out the Bickel firm’s website. Terlep turned around and asked whether he did that during the trial. The juror looked stunned and then said no. Terlep was incredulous and asked again whether the juror looked at the website during the trial and the juror admitted that yes he had.

The trial court observed that the juror had essentially “self-confessed” to misconduct, and expressed concern that looking at the website would be prejudicial in light of the fact that the Bickel firm specializes in lemon-law litigation. After Bickel said he would like to contact the juror, the court took a break to consult a Rutter Group book. When the hearing resumed, the court advised the parties that misconduct can be established by affidavits and then stated “you’re all affidavits, officers of the court, and then I’ve sworn in Mr. Tarver. So I’ve got my affidavits.” The court then found that the affidavits were admissible, the evidence established misconduct and the misconduct was prejudicial. Therefore, the court stated that it was “inclined on this record to grant the new trial.”

Bickel objected that he was not familiar with this area of the law and needed time to conduct research before he could properly address the matter. Therefore, the court continued the matter for briefing and set a hearing for two days later. However, the court declined to rule on Bickel's request to release the contact information for the juror in question, stating that it was not sure whether it would release that information. The court reasoned that it already had statements from three officers of the court and the sworn affidavit which appeared to be enough, and that it did not want to investigate a juror unless "we need to." However, the court invited counsel to brief the question.

**C. *The January 13 Hearing***

At the beginning of the continued hearing, the trial judge stated for the record that Mazda made an oral motion for a new trial, that Zhao was entitled to a noticed hearing, and that Mazda's memorandum in support of the new trial motion which was filed that day was "deemed" to be notice. The court then inquired whether Zhao wanted the court to set a hearing or if he was prepared to waive irregularities and argue the matter that day.

Bickel stated that Zhao did not waive irregularities and objected to the form and content of the notice, arguing that it did not comply with statutory requirements. (See Code Civ. Proc., § 659.) The court reiterated that it deemed the notice adequate and that it would continue the hearing to give Zhao the statutory time to respond. The court also stated that, although Zhao had actual notice of the motion, Mazda should file a formal notice as well.

The court also acknowledged that it had erred by failing to consider the rules requiring a noticed motion and the appropriate time frames and stated "I just want to make it correct because I don't want to be overruled on a technicality." The court stated that the matter was serious, that it had not "seen anything that would contradict granting these motions," but that it wanted to give the parties a full opportunity to address the matter so that no mistakes were made.

The trial court then denied Bickel's request for juror contact information, stating that Zhao was not necessarily entitled to that and that, under the circumstances, it was not necessary. In this regard, the court observed that the affidavits it already had established

that misconduct occurred. The court also expressed amazement that Bickel could not recall the conversation he had with the juror after Terlep walked away. In any event, the court stated that the presumption is that the misconduct was prejudicial and that it “found” there was prejudice here. Nevertheless, the court agreed to set a hearing and allow further briefing in order to comply with procedural requirements. After setting a briefing schedule and a February 4 hearing date, the court advised the parties that it would continue the hearing to a later date if Zhao was able to establish a proper basis for obtaining juror contact information.

**D. *The Stay Order and Final Judgment***

On January 18, Zhao filed an objection to Judge Mills presiding in any further proceeding concerning this action (Code Civ. Proc., § 170.30), arguing that the trial judge was biased and prejudiced against him and/or his attorneys.

On January 19, Mazda filed a notice of intent to move for a new trial and notice of motion for a new trial. That same day, the trial court filed an order staying this case pending resolution of Zhao’s Code of Civil Procedure section 170.30 challenge.

Despite the stay order, the parties filed briefs and evidence regarding the pending new trial motion. Mazda filed, among other things, a declaration by attorney Terlep pursuant to which it submitted a transcript of the January 11 post-trial hearing and a copy of the content of the Bickel Firm’s website. Zhao filed an opposition to the new trial motion in which he made three arguments: (1) Mazda’s evidence constituted inadmissible hearsay and thus did not constitute a proper affidavit; (2) the refusal to release juror contact information deprived Zhao of his statutory right to file counter-affidavits (Code Civ. Proc., § 659a); (3) Mazda’s evidence did not establish that any juror was biased against the defendant.

On April 6, the Honorable Susan Dauphine filed an order denying Zhao’s motion to disqualify Judge Mills. On May 13, the trial court filed a judgment on jury verdict pursuant to which it awarded Zhao \$20,326.62. Notice of entry of judgment was served on May 19.

**E.     *The May 20 Hearing***

The noticed hearing on the new trial motion finally commenced on May 20. The trial court's tentative decision was to deny Mazda's motion on the grounds that it failed to offer admissible evidence of juror misconduct, it had not requested juror contact information, and it was "content to submit its motion" solely on the basis of hearsay testimony.

At the May 20 hearing, Terlep began to argue against the tentative ruling but was interrupted by Judge Mills who asked whether Mazda would like to request juror contact information, stating that it was clear from the case law that Mazda was entitled to that information. Mr. Terlep replied that he would request that information only as an alternative and that his primary argument was that the new trial motion should be granted on the current record because (1) the fact that the juror admitted looking at the website was not hearsay; and (2) the trial court had already ruled that Mazda's evidence was admissible and that it proved juror misconduct.

Though acknowledging that Mazda's points could be valid, the court opined that it would be important to know what the juror actually looked at in order to assess prejudice. The court also opined that, although Mazda's affidavits would probably not be "completely" disregarded, they were not "enough to give a new trial." Finally, the court found that both parties had been prejudiced by the way the matter had "unfolded." Therefore, the court stated that it would reopen and reconsider the matter and that it would release the juror information to both parties in order to expedite the process.

Zhao objected to reopening the matter, arguing that Mazda had waived the right to juror contact information because of the way it pursued its new trial motion and its decision to stand on the evidence it already had notwithstanding that it was not even clear the juror had looked at the Bickel website. The trial court disagreed, stating: "I think the Court itself, with the ruling that was done somewhat sua sponte when this all came up after lunch that day was incorrect as to what are the standards. So I looked at it incorrectly." The trial court also observed that Mazda was not responsible for the delay caused by the stay order. Finally the court stated that it had "always" been concerned

that, right after lunch on the day of the incident, both of Zhao's attorneys claimed that they could not remember what they had discussed with the juror.

Under the circumstances, the court found that, in order to have a full record, information from the juror was important. The court set the continued hearing date for July 8 to ensure that the matter could be decided within 60 days of notice of entry of judgment. The court also stated that all papers on this and other post-trial motions were to be filed with the court by June 29.

**F. *The June Declarations***

**1. *Terlep's Declaration***

In anticipation of the continued hearing, Mazda's trial counsel, Bruce Terlep summarized his interactions with the individual who served as Juror number 22 at trial (hereafter Juror 22) in a declaration that was dated June 15 and filed some time thereafter.<sup>3</sup> On May 24, Terlep attempted to make telephone contact with Juror 22 but spoke instead to his father who indicated, among other things, that Juror 22 had already been contacted by Zhao's attorneys, that he was concerned that he was in trouble, and that he did not mean to do anything wrong by looking at the website *during the trial*. Juror 22's father stated that his son no longer lived at his home but that he would pass on Terlep's message in case he wanted to call him back.

On May 27, Juror 22 called Terlep. During that conversation, Juror 22 admitted that he had looked at the Bickel firm's website but claimed that he did so on his cell phone after the trial ended before he stopped to talk with Bickel outside the courthouse. However, several days later, on June 8, Juror 22 sent Terlep an e-mail in which he admitted that he had in fact looked at the Bickel website during the middle of the trial from his home computer. Juror 22 stated that he did so innocently, not understanding the severity of his actions. He also told Terlep that he had refused to sign a declaration drafted for him by the Bickel law firm. During a follow-up telephone conversation a few

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<sup>3</sup> Like many of the documents in Zhao' Appellant's Appendix, the copy of this declaration does not contain a court stamp reflecting when it was filed.

days later, Juror 22 told Terlep that he had received a “lot of pressure” from Bickel attorneys to state that he had not looked at their website during the trial, but that he decided that he had to do the right thing and tell the truth. He also told Terlep that he would sign a declaration that set forth a complete chronology of the facts as he knew them.

## **2.     *The June 16 Declaration***

On June 16, Juror 22 executed a declaration which Mazda filed in support of the new trial motion (the June 16 declaration). Therein, Juror 22 attested to the following facts: Approximately five minutes after the trial ended, Juror 22 had a brief conversation outside the courthouse with Bickel, Cline and Terlep; Mazda’s trial witness was also present; after Terlep said goodbye and began to walk away, Juror 22 asked Zhao’s attorneys if they were from San Diego; Terlep turned back around, approached Juror 22 and asked how he knew the lawyers were from San Diego; Juror 22 responded that he had looked at their website; while all the lawyers were still present, Terlep asked if Juror 22 had looked at the website during the trial; Juror 22 was taken aback by the question and did not immediately respond; Terlep asked the question a second time; Juror 22 said that “yes” he had looked at the website during the trial; Terlep then said he did not want to talk any more about the matter, thanked the juror for his service and walked away; Bickel and Cline remained with Juror 22 and engaged him in conversation as they walked down the street together; the attorneys asked again whether Juror 22 had looked at the website during the trial; Juror 22 responded that he had, but that he did not mean to do anything wrong.

In his June 16 declaration, Juror 22 also summarized his post-trial contact with the attorneys in this case. He stated that attorneys from the Bickel firm “convinced” him that he had not looked at the website during the trial and that they advised him to provide a statement that he had looked at the website on his cell phone after the trial was over during the five minutes before he talked with the lawyers outside the court house.

### **3.     *The June 24 “Declaration”***

On June 24, Zhao filed a pleading captioned as the “Declaration” of Juror 22, but signed instead by attorney Bickel. Through this pleading, Bickel purported to attach and incorporate a declaration by Juror 22. In fact, the attachment was an unauthenticated letter from Juror 22, dated June 20 and addressed to Bickel, Cline and Terlep. That letter contains a version of the events of January 11 which is substantially consistent with the June 16 declaration. However, the author of the letter stated that the Bickel attorneys did not encourage, advise or pressure Juror 22 to say that he looked at the website after trial, but that he made that false statement of his own volition, essentially out of fear and a desire for closure.

### **G.     *The July 8 Hearing and Order***

Prior to the July 8 hearing, the trial court issued a tentative ruling to grant the motion for new trial. At the hearing, Zhao opposed the tentative on the ground that it was unclear how much of the website the juror had actually seen and he requested additional time and permission to contact Juror 22 again to explore that question. The trial court denied that request for two independent reasons. First, the statutory time period for deciding the motion was about to expire. (See Code Civ. Proc., § 660.) Second, and in any event, Juror 22 had become so involved with the attorneys and so defensive about his actions that any additional statements would not be credible. Therefore, the court adopted its tentative ruling and granted a new trial.

That same day, the court drafted and filed a seven-page order. The court found that the June 16 declaration was admissible to the extent Juror 22 described or referred to an overt act or statement, but that statements about his subjective reasoning were inadmissible and ignored by the court. The court also found that the June 24 declaration that Zhao had filed did not meet any of the statutory requirements of a declaration and was completely inadmissible.

The court then found that admissible evidence established that Juror 22 looked at the Bickel Law firm’s website during the middle of the trial from his home computer which constituted juror misconduct. The admission that Juror 22 looked at the website

during the trial was a violation of clear instructions not to contact any attorney, do any individual research and “specifically not to go on the internet.” The court noted that it reinforced these instructions during the course of the trial.

Finally, the court found that the juror misconduct raised a presumption of prejudice which was not rebutted by counter-declarations as there were none. Furthermore, the court conducted a review of the entire record and identified several factors which supported a finding of prejudice: (1) the Bickel website contained a “primer on the Lemon Law” which specifically addressed issues important at this trial; (2) during jury deliberations, the jury asked a question about what constitutes a reasonable number of repairs, which the court declined to answer but which was specifically addressed on the Bickel website; (3) on the special verdict form, the jury found 9 to 3 against Mazda on a question addressing the reasonable opportunity to repair issue, (4) after trial, Juror 22 lied about what he had done and tried to cover up his actions before ultimately admitting his misconduct; (5) the content of the Bickel website contains inherently prejudicial information that was “substantially likely to prejudice a juror.”

### **III. DISCUSSION**

“The standard of review on a new trial motion alleging juror misconduct is abuse of discretion.” (*Sarti v. Salt Creek Ltd.* (2008) 167 Cal.App.4th 1187, 1213.) “ ‘Upon appellate review of an order granting a new trial, “all intendments are in favor of the action taken by the lower court [and] the affidavits in behalf of the prevailing party are deemed not only to establish the facts directly stated therein, but all facts reasonably inferred from those stated.” [Citation.]’ [Citation.] ‘ “When an issue is tried on affidavits . . . and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed.” [Citations.]’ [Citation.]” (*Grobson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 794.)

#### **A. *The Trial Court’s Jurisdiction***

Zhao’s primary contention on appeal is that the new trial order must be reversed because the trial court committed a jurisdictional error by disregarding statutory time requirements for filing evidence in support of the new trial motion.

### **1. *Statutory Framework and Issue Presented***

The procedure governing new trial motions is set forth at section 655 et seq. of the Code of Civil Procedure.<sup>4</sup> “Misconduct of the jury” is a statutory ground for a new trial. (§ 657, subd. (2).) A party moving for a new trial on this ground must file a notice of his intention to move for a new trial either (1) before judgment is entered or (2) within 15 days of the mailing or service of notice of entry of judgment or within 180 days after judgment is entered, which ever is earlier. (§ 659.) In addition, the motion must be “made upon affidavits.” (§ 658.)

Affidavits supporting or opposing the new trial motion must be served and filed within the time frames set forth in section 659a, which states: “Within 10 days of filing the notice, the moving party shall serve upon all other parties and file any affidavits intended to be used upon such motion. Such other parties shall have ten days after such service within which to serve upon the moving party and file counter-affidavits. The time herein specified may, for good cause shown by affidavit or by written stipulation of the parties, be extended by any judge for an additional period of not exceeding 20 days.”

The time for deciding a new trial is restricted by section 660 which states, in part: “[T]he power of the court to rule on a motion for a new trial shall expire 60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier, or if such notice has not theretofore been given, then 60 days after filing of the first notice of intention to move for a new trial. . . .”

In this appeal, Zhao contends that the trial court exceeded its jurisdiction by considering the June declarations because that evidence was filed after the statutory deadline. Pursuant to section 659a, Mazda was required to file affidavits in support of its motion within 10 days after the January 19 notice was filed, although the trial court had

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<sup>4</sup> Subsequent statutory references are to the Code of Civil Procedure unless otherwise specified.

express authority to extend that deadline an additional 20 days. However, Zhao contends, the trial court was absolutely precluded from considering the June declarations which were filed several months after the 30-day aggregate statutory time period for filing affidavits in support of the motion expired.

## **2. Analysis**

“The authority of a trial court in this state to grant a new trial is established and circumscribed by statute. [Citation.]” (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633; see also 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 19, p. 601.) “ ‘As the motion for a new trial finds both its source and its limitations in the statutes [citation], the procedural steps prescribed by law for making and determining such a motion are mandatory and must be strictly followed [citations].’ [Citation.]” (*Linhart v. Nelson* (1976) 18 Cal.3d 641, 644.)

Applying these principles, courts have held that the statutory time periods for filing a motion for a new trial and for deciding that motion constitute jurisdictional limitations on the trial court’s power to afford this relief. (See, e.g., *Douglas v. Janis* (1974) 43 Cal.App.3d 931, 936 [section 659 time requirement for filing notice “is jurisdictional”]; *Mercer v. Perez* (1968) 68 Cal.2d 104, 123 [section 660 time limits for deciding motion are mandatory and jurisdictional].)<sup>5</sup>

Zhao maintains that the section 659a time requirements for filing affidavits in support of a new trial motion are also jurisdictional and that violating those time requirements constitutes per se reversible error. To support this contention, Zhao relies on *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663 (*Erikson*).

*Erikson* was an appeal from an order denying a defense motion for a new trial on the ground of juror misconduct. The defendant had obtained a 20-day extension of time to file affidavits in support of his motion and had filed some declarations during the extension period and others after the time expired. On appeal, the *Erikson* court affirmed

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<sup>5</sup> There is no dispute on appeal that Mazda’s January 19 notice and motion was filed within the jurisdictional period established by section 659 and that the new trial motion was decided within the jurisdictional time frame established by section 660.

the order denying the new trial motion because it found that the only evidence of misconduct was a juror declaration that was filed after the 20-day extension granted by the trial court for filing affidavits in support of the motion. (*Erickson, supra*, 48 Cal.App.4th at p. 1670.) In reaching its decision, the *Erikson* court also found that the aggregate 30-day time period for filing affidavits in support of a new trial motion is jurisdictional and cannot be extended by the trial court. (*Id.* at p. 1672.)

Preliminarily, we note that the *Erikson* court's conclusion that the section 659a time requirements are jurisdictional is dictum. The *Erikson* trial court *denied* a new trial and the appellate court found that the only evidence of juror misconduct was a declaration that was filed after the statutory deadline. Since a trial court does not abuse its discretion by refusing to consider late filed evidence (*Peterson v. Peterson* (1953) 121 Cal.App.2d 1, 9), the *Erikson* court did not need to reach the jurisdictional question to affirm the order in that case. Furthermore, we are not persuaded by the analysis the *Erikson* court employed to reach the conclusion that the section 659a time requirements are jurisdictional limitations on the court's authority to grant a new trial motion.

The *Erikson* court found support for its conclusion in the statutory language itself. It was heavily influenced by the mandatory language in this provision. Indeed, it appears that the court viewed that mandatory language as compelling the conclusion that the time limitations are jurisdictional. (*Erikson, supra*, 48 Cal.App.4th at pp. 1671-1672.) However, despite the mandatory language employed throughout the new trial statutes, all of the procedural requirements governing new trial motions are not jurisdictional. For example, as Zhao concedes in his appellate brief, although section 659 mandates that a notice of intention to move for a new trial must state whether the motion is made on affidavits or court minutes, failure to comply with this requirement does not deprive a trial court of jurisdiction to grant the motion. (*Nichols v. Hast* (1965) 62 Cal.2d 598, 601.)

In addition to the use of mandatory language, the *Erikson* court emphasized that section 659a "specifies a consequence for exceeding the time limit for filing of an affidavit in support of a new trial motion." (48 Cal.App.4th at p. 1672.) According to the

court, the prescribed “remedy” for failing to comply with the 10-day filing deadline is that the trial court may extend the time to file for an “additional period of not exceeding 20 days.” (*Ibid.*, italics omitted.) Therefore, the court concluded that section 659a “must be read as mandating only that remedy.” (*Ibid.*) Furthermore, the court found that because the 30-day aggregate period for filing affidavits in support of a motion may not be exceeded, “the trial court has no discretion to admit affidavits submitted thereafter.” (*Ibid.*)

We interpret this statute differently. In our view, the 20-day extension period authorized by section 659a is not a “remedy” for failing to comply with the 10-day time requirement, but rather an option available to the trial court to account for unforeseen circumstances. Furthermore, this section does not prescribe or otherwise address the remedy for exceeding the aggregate 30-day period for filing initial affidavits in support of the motion. However, section 659a does authorize the filing of counter-affidavits within an additional 30-day period. Section 659a does not preclude the trial court from accepting counter-affidavits from a moving party when there is a valid basis for doing so. Indeed, as this case demonstrates, such an option may sometimes be the only way to obtain the evidence necessary to fairly resolve what can be an extremely serious matter.

The *Erikson* court also found that the “express” limitations of section 659a are not arbitrary and that they are “hedged by other mandatory time frames for initiating and resolving a new trial motion.” (*Erikson, supra*, 48 Cal.App.4th at p. 1672.) We agree. However, the *Erikson* court apparently did not consider that, within that hedge, the trial court has broad discretion. Of course, because those other time frames are jurisdictional limitations on the trial court’s power, accepting evidence that has not been filed in compliance with the section 659a time limits may often constitute an abuse of discretion. However, it is simply too easy to conceive of situations where denying the trial court

discretion to consider relevant evidence produced during the jurisdictional time period for ruling on the motion would result in manifest injustice.<sup>6</sup>

Furthermore, although we have not found a published decision which addresses the jurisdictional issue in the present context, courts and commentators have expressed the opinion that the section 659a time requirements for filing affidavits are not jurisdictional. (See *Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1648 (*Fredrics*); *Wiley v. Southern Pacific Transportation Co.* (1990) 220 Cal.App.3d 177, 188 (*Wiley*); *Clemens v. Regents of University of California* (1970) 8 Cal.App.3d 1, 21-22 (*Clemens*); see also 8 Witkin, Cal. Procedure, *supra*, Attack on the Judgment in Trial Court, § 65, p. 650.)

*Fredrics, supra*, 29 Cal.App.4th 1642, was an appeal from an order denying a motion for new trial on the ground of juror misconduct. The *Fredrics* court held the trial court did not abuse its discretion by considering counter-affidavits that were filed after the 10-day deadline expired because “[t]he 10-day period is not jurisdictional . . . .” (*Id.* at p. 1648; see also *Boynton v. McKales* (1956) 139 Cal.App.2d 777, 782 [“In contrast to the period for filing the motion for a new trial the extension of which is expressly prohibited by section 659, the 10-day period for filing affidavits is not so limited.”].)

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<sup>6</sup> Indeed, this case is a good example. As reflected in our factual summary, the trial court committed several procedural missteps in connection with this motion which took some time to set right. In addition, Zhao’s unsupported claim of bias against this trial judge further delayed both the release of juror contact information and the resolution of this matter. Furthermore, at the May 20 hearing, which was the first hearing conducted after the stay was lifted, the trial court set a specific deadline for filing evidence relevant to the motion. Mazda, which did not contribute to the delays in the post-trial proceedings, filed its June declarations within the time frame established by the trial court at the May 20 hearing. Indeed, Zhao also filed a so-called declaration during that extended time period for submitting evidence, although his evidence was patently incompetent. Finally, the June affidavits that were submitted after the statutory deadline constitute compelling evidence of juror misconduct and also suggest that Zhao’s trial counsel has been aware of that misconduct since January 11, the very day that it occurred.

*Wiley*, *supra*, 220 Cal.App.3d 177, was an appeal from an order granting a new trial motion on the ground of juror misconduct. Appellant argued the order could not stand because the moving party failed to file a “ ‘no-knowledge’ ” declaration stating that he was not aware of the improper conduct prior to the verdict. (*Id.* at p. 186.) The no-knowledge filing requirement is a long-standing judicially declared rule which, although described as a mandatory requirement is subject to many exceptions. (*Id.* at p. 187, fn. 4.) The *Wiley* court held that the failure to file a no-knowledge declaration is a procedural defect which is subject to the invited error rule and can be waived by failure to object if the defect was curable. The court then concluded that the defect could have been cured had it been raised at the hearing on the new trial motion in that case. To reach this conclusion, the court acknowledged that there are strict statutory requirements for filing affidavits, but it also observed that “it has been held that the time limits for filing the affidavits in support of a new trial motion are not jurisdictional in contrast to the time limit for filing the new trial motion under Code of Civil Procedure section 659.” (*Id.* at p. 188.)

In *Clemens*, *supra*, 8 Cal.App.3d at pages 21-22, the appellate court vacated an order denying a motion for a new trial and instructed the trial court to conduct a new hearing on the motion. The *Clemens* court recognized that its remand order created a problem because the “strict time limits for the filing of affidavits and counteraffidavits” contained in section 659a had “long past.” (*Id.* at p. 21.) However, after observing that these time limits are “not jurisdictional,” (*ibid.*) the court found that there is “an inherent judicial power incident to the appellate process to permit the filing of affidavits and counteraffidavits after the remittitur and before rehearing on the motion.” (*Id.* at p. 22.)

These cases all support the conclusion that, while the statutory time limits delineated in section 659a are strict, they are not jurisdictional limitations on the trial court’s authority to grant a new trial.<sup>7</sup>

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<sup>7</sup> Indeed, in light of this authority, Witkin opines that while “[a]ffidavits or declarations filed too late may be disregarded . . . the time limits are not jurisdictional. The court may still consider an affidavit or declaration even if it is filed after the

For all of these reasons, we hold that the trial court did not exceed its jurisdiction by considering the June declarations, which were filed after the statutory time periods set forth in section 659a, but during the time that the trial court had jurisdiction to rule on the new trial motion.

**B. *Sufficiency of the Evidence***

Zhao contends there is insufficient evidence to support the new trial order because (1) the first set of “affidavits” was incompetent and insubstantial; (2) Mazda was “estopped” from relying on Juror 22’s June 16 declaration; and (3) even if all the evidence is considered, Mazda did not suffer prejudice.

**1. *The January Affidavits***

As reflected in our factual summary, the trial court made a finding at the January 11 hearing that representations the attorneys made in open court about their post-verdict interactions with Juror 22 constituted affidavits supporting the motion for new trial. The court also found that the sworn statement of Roger Tarver, Mazda’s client representative, was an affidavit. On appeal, Zhao argues that these January affidavits must be completely disregarded for two reasons.

First, Zhao contends that the January affidavits are not competent evidence of juror misconduct because they were presented to the trial court before Mazda made a proper, valid motion for a new trial. According to Zhao, the oral motion for new trial that Mazda’s trial counsel made at the January 11 hearing was an “idle act[] of no legal significance” because the statutory procedure does not authorize an oral motion. Therefore, Zhao reasons, evidence of misconduct that was presented in conjunction with that invalid motion was also of no legal significance. To support this theory, Zhao relies on section 659 and *Maple v. Cincinnati, Inc.* (1985) 163 Cal.App.3d 387, 392 (*Maple*).

Zhao posits that, because “section 659 calls for the filing of a written notice of intent to file a motion,” oral motions for new trial are invalid. This argument is a non-

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deadline.” (8 Witkin, Cal. Procedure, *supra*, Attack on the Judgment in Trial Court, § 65, p. 650.)

sequitur. Section 659 does not expressly nor implicitly prohibit an oral motion for new trial supported by a proper written notice. Here, the record shows that Mazda did file a written notice of its intent to move for a new trial on January 19, and there is no dispute on appeal that the January 19 notice satisfied the jurisdictional requirements of section 659.

Furthermore, *Maple, supra*, 163 Cal.App.3d 387, is inapposite. In that case, the moving party filed two *notices* of his motion for a new trial, which the trial court ultimately granted. On appeal, the *Maple* court found that the first notice was timely and proper and, therefore, the second notice was “clearly [an] idle act[] of no legal significance.” (*Id.* at. pp. 391-392.) The *Maple* court said nothing, however, about the legal significance of an oral motion for new trial which is followed up and supported by a notice that satisfies the requirements of section 659.

Zhao does not identify any legal authority which precludes a party from making an oral motion for new trial and then subsequently filing the written notice required by section 659. Nor does he support his assumption that evidence of juror misconduct may only be presented to the court after the section 659 notice is filed. Finally, and in any event, both Zhao and Mazda attached transcripts of the January 11 hearing to declarations that were filed after Mazda filed its January 19 notice.

Which brings us to Zhao’s second theory; he contends that the witness statements that were made at the January 11 hearing are not “affidavits” in any form. Specifically, Zhao argues that the statements made by attorneys were not affidavits because the attorneys did not testify under oath. Furthermore, although Roger Tarver did make a sworn statement, Zhao complains that he was denied notice and the opportunity to cross-examine this witness.

Zhao did not raise these issues at the January 11 hearing when the evidence was presented. Nor did he object to the court’s finding at that hearing that the statements by the attorneys and Mr. Tarver constituted affidavits. Therefore, Zhao waived his objections to this form of proof. (*Bardessono v. Michels* (1970) 3 Cal.3d 780, 793 [defendant waived objections to the form of proof of juror misconduct by failing to object

in the trial court].) Furthermore, Zhao fails to substantiate his theories as to why the statements by the attorneys and Roger Tarver cannot be construed as affidavits.

Although Zhao complains that the attorneys were not expressly sworn, he does not dispute that the trial court solicited statements from them in their capacity as officers of the court. Because attorneys are officers of the court, “ “ “when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.” ’ ’ ” (*Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 594; see also *Mosesian v. State Bar* (1972) 8 Cal.3d 60, 66 [even when not sworn as a witness, an attorney is “held to the same high standards of honesty and candor in his statements to the court.”]; Bus & Prof. Code, § 6068, subd. (d) [“It is the duty of an attorney . . . never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”].) As for Roger Tarver’s declaration, Zhao’s idea that he had a right to cross-examine that witness is inconsistent with settled law. Since the statutory procedure requires that a motion for new trial on the ground of misconduct be made upon affidavits, parties may not call or cross-examine witnesses. (*Linhart v. Nelson* (1976) 18 Cal.3d 641.)<sup>8</sup>

Alternatively, Zhao contends that the January affidavits are inadmissible hearsay because they were relevant only to prove the truth of Juror 22’s out of court statements that he looked at the website during the trial. (Citing Evid. Code, § 1200.)

Relevant evidence of statements made by a juror is not excluded by the hearsay rule when it is offered to establish the verbal act of making the statements and not to prove the truth of what was said or the effect of the statements on the jurors’ mental processes in arriving at a verdict. (*Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983, 989-990.) Thus, for example, in *Grobesson v. City of Los Angeles*, *supra*, 190

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<sup>8</sup> To the extent that the trial court’s hybrid approach of taking an oral statement from a witness under oath can be construed as oral testimony, Zhao did not object. “[I]n a hearing on a motion for new trial, the use of oral testimony, to which no objection is tendered, does not taint the procedure with a jurisdictional defect.” (*Bardessono v. Michels*, *supra*, 3 Cal.3d at p. 793.)

Cal.App.4th at pages 792-793, the court found that an attorney declaration recounting a juror's statement that she had prejudged the case was not inadmissible hearsay. The court invoked the rule that, “ ‘[u]nder the Evidence Code, no hearsay problem is involved if the declarant's statements are not being used to prove the truth of their contents but are being used as circumstantial evidence of the declarant's mental state.’ [Citation.]”

Applying these rules here, we find that the January affidavits are not inadmissible hearsay because observations by the attorneys who participated in the January 11 incident constitute non-hearsay evidence of juror misconduct. Putting aside the truth of Juror 22's admissions, this juror approached plaintiff's counsel within five minutes after the verdict was entered and told them that, contrary to express jury instructions, he checked out their website during the trial. When the defendant's attorney questioned Juror 22 about what he had done, the juror was embarrassed and reluctant to answer. Finally, after Mazda's attorney left, Juror 22 had a private conversation with Zhao's attorneys during which he appeared upset and afraid that he had done something wrong. Indeed, attorney Bickel was so shaken by his exchange with Juror 22 that, only an hour later, he told the trial judge that, as an officer of the court, he could not remember what the two had said to each other.

These and other first-hand observations about the post-verdict encounter with Juror 22 constituted circumstantial evidence of Juror 22's state of mind and of his bias against Mazda. In other words, the fact that Juror 22 made the statements that were recounted in the January affidavits and the circumstances under which those statements were made constitutes relevant non-hearsay evidence.

Zhao contends that this court should defer to the trial court on this particular issue and, according to Zhao, the trial court made a finding at the May 20 hearing that the January declarations were inadmissible hearsay. As our factual summary reflects, we strongly disagree with Zhao's interpretation of May 20 hearing. Suffice to say, the only time that the trial court characterized the January affidavits as hearsay was in a tentative ruling that was *not* adopted as the court's actual ruling.

## **2. *Juror 22's Declaration***

Zhao contends that, even if the trial court did not exceed its jurisdiction, it abused its discretion by considering Juror 22's declaration. To support this claim, Zhao invokes the doctrine of judicial estoppel, arguing that Mazda should not be allowed to benefit from the juror contact information because it consistently objected to disclosing that information until it became clear that his motion would fail without it.

“ ‘ “Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary. ” ’ [Citation.] The doctrine applies when ‘(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.’ [Citations.]” (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.

In the present case, Zhao did not invoke this doctrine in the trial court and, even if he had, there was no basis for applying it against Mazda. Mazda did not take inconsistent positions with respect to the juror contact information. Rather, it has always maintained that the January affidavits constituted sufficient evidence of misconduct which made it unnecessary to contact the jurors. Furthermore, contrary to Zhao's argumentative and self-serving summary of the lower court proceedings, the trial court did not accept Mazda's position on this issue and Mazda never gained any advantage by taking it.

## **3. *Sufficiency of the Evidence***

Finally, Zhao contends that, even if all of the evidence is considered, “there was still an inadequate showing for a new trial” because there is no evidence that Mazda suffered any prejudice as a result of the juror misconduct.

The January and June affidavits, whether considered separately or together, constitute substantial evidence that Juror 22 committed misconduct by violating the

court's instructions and looking at the Bickel firm's internet website during the trial. That evidence of misconduct gives rise to a presumption of prejudice. This presumption can be rebutted by (1) an "affirmative evidentiary showing that prejudice does not exist" or (2) an "examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 416-417.)

In the present case, Zhao did not make an affirmative showing that prejudice does not exist; he did not present any competent evidence addressing the prejudice question. Nevertheless, on appeal, Zhao contends that there is no reasonable probability that Mazda was actually harmed by the misconduct because, in Zhao's view, the Bickel firm's website was relatively innocuous. We are not persuaded by this self-serving and conclusory argument.

Furthermore, the trial court conducted a review of the entire record from which it gleaned several circumstances supporting the conclusion that Mazda suffered prejudice. For example, the court found that the Bickel website contains a "primer on the Lemon Law" and that it contains inherently prejudicial information which is "substantially likely to prejudice a juror." The court also found that the website specifically addressed issues important at this trial, including the question of what constitutes a reasonable opportunity to repair. This precise issue was the subject of a question posed by the jury during deliberations which the trial court declined to answer. And, the jury subsequently found 9 to 3 against Mazda on this issue, concluding that it did have a reasonable opportunity to repair in this case. Finally, the trial court also pointed out that Juror 22 lied about the fact that he looked at the website during the trial and that he tried to cover up his actions before ultimately admitting his misconduct.

The trial court's detailed findings, which Zhao literally ignores on appeal, are more than sufficient to answer Zhao's unsupported contention that the juror misconduct was not prejudicial.

#### **IV. DISPOSITION**

The order granting Mazda a new trial is affirmed.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Richman, J.